remedy the evils of the Trusts so far as the interstate commerce is concerned, and the State Governments may do much to protect the people from unreasonable and unjust exactions of the Trusts within their own borders, yet the fact remains that full relief cannot be afforded until there shall be a complete revision of the existing Tariff Law, which is conceded to be the "Mother of the Trusts."

JOHN GOODE.

CONTRACTS LIMITING LIABILITY OF CARRIERS FOR NEGLIGENT INJURY TO FREE PASSENGERS.

THE case of *N. & W. Railway Co.* v. *Tanner*,[1] recently decided by Supreme Court of Virginia, is one which presents a very interesting question of law, namely, the question of the validity of a contract by a passenger-carrier, exempting itself from liability for the negligence of its servants in the case of a passenger traveling on a free pass.

The decision of the court holding such contracts invalid, while supported by authority of dignity and weight, is, in the writer's opinion, to be regretted. Without intending any particular criticism of the above decision, it may be of interest to consider the arguments advanced in support of the general line of cases holding views similar to those expressed by the court in the principal case, and also to note how these arguments have been answered, and what we conceive to be the better reason advanced by courts holding the contrary view.

But before passing to a consideration of this question upon common law principles, it might be well to notice the opinion of the court in the case mentioned, with respect to the bearing of section 1296 of the Code of Virginia upon the question at issue. It is not entirely clear from the opinion whether the court in this case rested its decision upon the *statute* or upon *common law*. It would appear, however, that the court considered either the statute or the common law sufficient to warrant its conclusions.

So far as the statute in question is considered, it may, we think, well be doubted whether it was ever designed to compass in its scope the case of a passenger riding on a free pass. The language of section 1296 is as follows:

[1] 8 Va. Law Reg. 182; 41 S. E. 721.

"No agreement made by a common carrier for exemption from liability for injury or loss occasioned by his own neglect or misconduct, shall be valid."

Of this statute the court in the principal case says: "Its meaning is so plain that we hesitate to construe it lest it should be found that the interpreter is the hardest to be understood of the two." The court then proceeds to apply this statute to the case of a passenger riding on a free pass, without so much as regarding as open to question the applicability of the statute to such a case.

It will be noted that the statute does not, in general terms, declare invalid all agreements for exemption from liability for negligence; but the language employed is, "No agreement made by a common carrier for exemption," etc. Now it would seem patent that the scope of the section is to be determined by the meaning given the term "common carrier." We had hitherto regarded this term as one of a well-known technical significance in the law, and would not have thought it open to question that its interpretation, as used in our statute, would be according to the settled rule as stated by the court in the case of *Western Union Telegraph Co.* v. *Scircle*,[2] in the following language: "Where the statute employs common law terms having a known meaning it is presumed, unless the contrary affirmatively appears, that the terms were used in their common law meaning." What, then, is the common law meaning of the term "common carrier"? The definition which is said to be the most usually accepted one is that of C. J. Parker in *Dwight* v. *Brewster*,[3] where it is said that a common carrier is "one who undertakes *for hire* to transport *the goods* of such as choose to employ him, from place to place."[4] It will thus appear that, technically speaking, the term "common carrier" does not refer to a carrier of persons at all, but merely to a carrier of goods, and it would seem to be unquestionably true that one is not a common carrier, even as to goods, unless the carriage be *for hire*.[5]

In *Citizens Bank* v. *Nantucket Steamboat Co.*,[6] the court, by Judge Story, said:

"I take it to be exceedingly clear that no person is a common carrier, in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier, in all our books, fully establishes this result. If no compensation is received he is not, in the sense of the law, a common carrier,

[2] 103 Ind. 229.
[3] 1 Pick. 50.
[4] Story on Bail., sec. 495; Hutchinson on Carriers, 47.
[5] Hutch. on Car., sec. 44.
[6] 2 Story (U. S.) 16.

but he is a mere mandatory or gratuitous bailee, and his rights, duties and liabilities are of a very different nature and character from those of a common carrier."

In A. & E. Ency. of Law[7] numerous definitions are cited to the above effect, and in recognition of the well known meaning of the term, this language is used: "In accordance with *general usage* where the term 'common carrier' is used in this title, without qualification, it is to be understood to refer to a common carrier of goods."

If, therefore, section 1296 is to be construed according to the common law meaning of the term, how can it be deemed to refer to passenger carriers? Such a meaning may, of course, be given to the words, but can they be so judicially interpreted without ignoring the established significance of legal nomenclature? It is not to be denied that there are to be found in the books cases in which passenger carriers are loosely referred to under this general term, but such isolated cases do not furnish authority for overturning an established doctrine of the law. And in view of the well recognized distinction between the duties and liabilities of carriers of goods and carriers of passengers, it would seem not only wise but necessary that the two classes should be designated by different legal terms and not comprehended under one name. That such a distinction exists is not traceable to any mere caprice of courts and text-writers, but to a fundamental difference in principle. It would, perhaps, strike a student of the law, who for the first time sought a definition of this term, as somewhat anomalous to be told that by the term "common carrier" is meant one who carries goods for hire, with *insurance* liability; one who specially carries goods for hire which are not in his regular line, with *reasonable* diligence as the test of liability; one who carries goods free, with the liability of a *gratuitous bailee*; one who carries passengers for hire, with liability for the *utmost human foresight* and care; and one who carries passengers free with stipulations against any liability whatever for negligence, which are respected in some States and not in others. But if there is to be no discrimination in applying the term—if its ancient limitations are not to be respected—it may as well be applied to one of the above classes as to another, with the result that when the term "common carrier" is used in statutes or in books it may have five separate and distinct

[7] 2d ed., 238, note.

meanings. It would surely seem that clearness in thought and discussion demands that the original restricted definition should be given the term.

We pass now from this phase of the question to a consideration of it upon its merits in the light of judicial decision. It is not our purpose to consume space in a useless collation of authorities which may be found in any digest or index. It is admitted that there is authority of reputable courts to be found on each side of the question. It may be of interest to note, however, that the courts of England, Canada, Germany, France, and Italy, have declared in favor of the validity of such contracts.[8]

The Supreme Court of the United States, while clearly against the validity of such contracts in the case of passengers for hire, does not appear to have passed upon the question in the case of gratuitous passengers. The courts of the different States are in hopeless discord; some of the ablest courts, however, notably those of the States of New York, New Jersey, Massachusetts, Connecticut, Maine, Wisconsin, Georgia, Louisiana, Washington, Illinois, and Indiana, hold in favor of the validity of such contracts, though distinctions are made by some of these courts between cases of gross and ordinary negligence, upholding the exemption in all cases save gross negligence.

The doctrine announced by the Virginia court has been adhered to in the States of Iowa, Minnesota, Mississippi, Missouri, Pennsylvania, and Texas.

It is a remarkable circumstance that many of the text-writers, as well as courts, refer with singular inaccuracy to the doctrine adopted by the Virginia court as the majority view. We have been unable to find authority to justify such a statement, even in this country; and when we take an international view, it would certainly seem that the general rule supports the validity of such agreements. As illustrative of the apparent lack of accuracy in digesting and classifying the decisions on this branch of the law, we may cite the case of the Indiana court, which has been well nigh universally placed in the column with those courts which are in line with our Supreme Court. Yet the Supreme Court of Indiana, in the recent case of *Payne* v. *Terre Haute and I. R. Co.*[9] reverses the Appellate Court of the same State, and, upon the precise question which we are dis-

[8] Wheeler's Modern Law of Carriers, p. 97, note 1.

[9] (Jan. 10, 1902), 62 N. E. 472.

cussing, declares in favor of the validity of exemptions from liability for negligence in the case of free passengers. On page 473 the court says: "The precise question raised by this appeal has not heretofore been presented to this court." And after reviewing the decisions which are regarded as controlling the question, the court proceeds to say (page 474): "These represent the decided weight of authority." And again, on the same page, "Not only is no principle of public policy subverted by denying the holder of a free pass the right to repudiate his contract, but there is sound public policy in holding him to it." Again, so learned an author as Judge Cooley, in his work on Torts, which is cited by our court in the principal case, after referring to the rule in New York and New Jersey upholding such contracts, says: "The weight of authority, however, is most distinctly the other way, both in this country and in England."

We find it difficult to reconcile this statement with the decisions themselves, and, with respect to the English courts, it would seem to be clearly inaccurate.[10] This confusion of thought is doubtless due to a failure to discriminate between decisions relating to the right of the carrier to exempt himself from liability in the case of *paid* passengers, which right is well nigh universally denied, and those relating to his right of exemption in the case of *free* passengers. Certain it is that in the discussion of this latter question, so different in principle from the former, decisions in the cases of paid passengers are cited by the courts with surprising frequency, and have unquestionably had great influence with courts holding views similar to our own court.

It is alike amusing and amazing to follow the line of reasoning pursued by some of the courts in the less recent cases involving this question, and to note how this fatuous principle of public policy has been misapplied to cases of the character under discussion. For instance, in an elaborate dissenting opinion in the case of *Wells* v. *The New York Central Railroad Co.*,[11] Sutherland, J., uses the following language: "After a careful consideration of this important question, I have come to the conclusion that the contract is illegal and void, and should be held to be so, as against

[10] See 5 A. & E. Ency. Law (2d ed.) 620 and note, where the authorities are collected. See also Griswold v. New York, etc. R. Co., 4 Atl. 263, where it is said: "By the English decisions it is clear that the carrier has full power to provide by contract against all liability for negligence in such cases"—citing numerous authorities.

[11] 24 N. Y. 181.

public policy, as declared both by the common law and the statute law," and he proceeds to illustrate as follows: "If A requested B to beat another and promised to save him harmless, the promise is void. So if A promised in consideration of twenty shillings paid to him by B, he will pay B forty shillings if he does not beat G S out of such a close the promise is void. These are cases put in the books, and it is said that the contracts are illegal as *contra bonos mores.*" Note the argument: Because it is against public policy to enforce a promise to indemnify B against loss for beating C, *therefore,* it is against public policy to enforce the promise of a free passenger to waive his right of action against a carrier for injuries due to the negligence of the carrier's servants. As if such a contract were to be measured by the same standard as one having for its *object* the perpetration of a misdemeanor or a felony. The opinion last cited is an old one (1862), and, doubtless, it, along with others of a kindred nature, has had its influence as a precedent in the formation of the rule which our court has adopted. We cite it simply to support a conclusion which we believe to be true, namely, that at its fountain head there is no inherent justice or reason to be enlisted in its support.

The case of *Jacobus* v. *St. Paul & Chicago Ry. Co.*[12] also affords a conspicuous example of the inherent weakness of the argument of courts that attempt to vindicate their hostility to these free pass exemptions by recourse to the reason of things. This case is given more than ordinary emphasis by courts of a like opinion as a strong precedent. In discussing these contracts, the court notices the considerations advanced in support of their validity, namely (to use the court's own statement), "that it is unreasonable to suppose that the managers of a railroad train will lessen their vigilance and care for the safety of the train and its passengers because there may be a few on board for whom they are not responsible"; and by way of reply: "Suppose (what is not at all impossible or improbable, as for instance, in the case of a free excursion) that most or all of the passengers upon a train were gratuitous, or riding upon conditional free passes, the consideration urged would be no answer to a claim that the carrier should be responsible. A general rule can hardly be based upon such calculations of chance." We may be pardoned for saying, that if there is any force whatever in this argument, we have been unable to perceive it. A 'free ex-

[12] 20 Minn. 125.

cursion'—a train upon which 'most or all of the passengers are gratuitous'—has such a train ever been heard of? Will such a train ever be heard of as long as railways are run for money? Such a statement is scarcely worthy of the intelligent court that gave it utterance. And yet a decision resting upon reasoning such as this is gravely cited and followed as a "leading case," and, like the New York case, last mentioned, goes forth to take its place in the literature of the law, and to wield an influence in the determination of questions involving the gravest interests.

It is a simple matter to say, that a contract is invalid because it is contrary to public policy; and it is not difficult to say that it *is* contrary to public policy because such and such courts have so held. But this is not a satisfactory solution of the matter for one who seeks the ultimate reason of things. If a doctrine cannot vindicate itself at the bar of reason it is essentially weak.

Our inquiry is, not what courts have declared such contracts invalid, but *why* have such contracts been declared invalid? And a perusal of the leading cases holding this view fails to reveal any other reason advanced than that such contracts of exemption are contrary to public policy because they have a tendency to decrease the diligence of the carrier and thus to jeopardize the public safety in travel. Either this statement of the objection to such contracts is made or some other equivalent form of words is employed. In essence, it is the *parens patriæ* theory; and this theory, as applied to the case of a passenger riding upon a free pass, leading to the conclusion that such limitations of liability will tend to increased negligence and recklessness on the part of the carrier where human life is at stake, and that, therefore, the State, as the guardian of its citizens, must prohibit such agreements, we think may very properly be characterized, in the language of the Supreme Court of Washington, elsewhere cited, as "mere fancy."

A simple statement of the case, it appears to us, will suffice to refute the views of these and kindred cases. It will not be gainsaid that railroad companies are organized and operated, not from philanthropic motives, but for profit. And so long as they are run for profit, there need be no fear that the list of free passengers will ever bear any considerable ratio to the list of paid passengers. Now every paid passenger has an unalterable right of action for injuries arising from negligence, and on every train there are dozens of paid passengers to every free passenger without a right of action.

Will a railway company, then, operated for profit, use less diligence to insure the safety of passengers because of the presence of *one* free passenger, without redress for negligence, when there are twenty-five paid passengers, each of whom has his action for damages? Does human experience teach us that a man or a corporation will risk the loss of one hundred thousand dollars, because one thousand dollars of the loss would not fall upon him or it?

Such arguments likewise lose sight of other important considerations. There are few centers of traffic in this country between which there are not two or more lines running. The public may be depended upon to take the safest route if there is any question of danger. And each railroad company, in a spirit of competition, may be depended upon to use its best efforts to make its line the safest to catch the favor of the paying passenger, with never a thought of the gratuitous passenger. Not only so, but it must not be forgotten that aside from the right of action for damages, the act of negligence that wrecks the train causes incalculable damage and loss to the company, delaying its traffic, destroying its track, affecting its good name, and demolishing its cars. Self preservation is a fundamental principle both as to one's life and to one's property. The man who owns a thousand-dollar horse may be depended upon to bestow a high degree of care upon it, not merely because he fears that his horse will run away and do damage to third persons for which he may be held to answer, but because, primarily, he fears that he may lose or injure his horse. Yet a railroad company is solemnly presumed by learned courts, under the mystic influence of such high-sounding terms as *"parens patriæ,"* "public policy," and the like, to be tempted to negligence by the infinitesimal circumstance of the presence of a free passenger on its train (a fact that is scarcely known to a living soul besides the conductor) when thousands of dollars invested in its rolling stock would be irretrievably lost, and scores of damage suits precipitated, by the same negligent act that would injure the free passenger! We submit, without jest, that it is quite as reasonable to presume that the owner of a thousand-dollar horse, on which there is a ten-dollar saddle that belongs to some one else, would be tempted to let his horse run away, because, even though the horse be injured or killed, the loss of the saddle would fall on some one else! What solace would the railroad company get in the hour of

its vicissitude, with its engine and its cars in ruins, and a score of damage suits pending, from the consideration that it was at least protected from the unpaid passenger!

The foregoing arguments have not been overlooked by the learned courts that have upheld the validity of the contracts under discussion; and, as the court in the principal case did not cite a single adverse decision, it might be of interest to the reader to append a few of them.

In *Wells* v. *New York Central Railroad Company*,[13] the court uses this language:

"Upon the reasoning above, and upon any legal principle—whether founded upon public policy or otherwise—there seems to be nothing illegal in such a contract. It cannot reasonably be said that, because five or ten persons on a train that carries two hundred have such passes, there is the less inducement to care on the part of the company or its agents, or that a feeling of indifference to human life would be thereby caused. The quantum of interest, the ratio of motive, is too utterly insignificant, when compared with the vast liability not protected by any contract, and binding the company and its agents to every measure of caution. That agents will be careless, that no considerations are sufficient to induce constant vigilance, we have frequent and terrible proofs. But the holding of such contracts illegal would not even tend to alter the fact."

In *Perkins* v. *New York Central Railroad Company*[14] the same line of reasoning is pursued, as follows:

"It may be urged that such contracts of exemption, if permitted, will tend to a relaxation of vigilance on the part of railroad companies, and that this affects the security of large numbers of persons, and is, therefore, a matter of public interest. But we have no reason to suppose that the practice ever has been carried to such an extent as to produce any appreciable effect in this way; and there is little danger that it ever will be. It is confined to the comparatively few cases in which persons travel gratuitously. If, however, it should ever prove productive of evil consequences, which I do not apprehend, it would, I think, be better to leave the remedy to the legislature than for the courts to break in upon the settled rules of law in respect to the right of individuals to bind themselves by contract. To establish the principle contended for would be an act of pure judicial legislation, and would in my judgment be an unwarrantable assumption of power."

In the comparatively recent case of *Quimby* v. *Boston & M. R. Co.*,[15] the Supreme Court of Massachusetts in a forceful opinion uses the following language in this connection:

"The service which he [the carrier] undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties. In yielding to the solicitation of the passenger he consents, for the time being, to put off his public employment and to do that which it does not impose upon him. The

[13] 24 N. Y. 185. [14] 24 N. Y. 217. [15] 23 N. E. 20.

plaintiff was in no way constrained to accept the gratuity of the defendant. It had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously, also to be responsible to him in damages for the negligence of its servants. It is well known that, with all the care that can be exercised in the selection of servants for the management of the various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that, besides the gift of free transportation, the carrier should be held responsible for these when he has made it the condition of his gift that he should not be."

The case of *Griswold* v. *New York & N. E. R. Co.*[16] is generally regarded as containing one of the strongest statements of the rule relieving the carrier in such case. In this case the court says:

"In ordinary transactions such a breach of good faith, to say nothing of the breach of contract, would be disgraceful. . . . Under these circumstances it does not seem reasonable to add to a free gift of transportation the burden of insuring the passenger against all personal injuries arising from the negligence of the carrier's servants; the risk being well known and willingly assumed by the passenger on the condition upon which the gift is made. The parties contracting for this exemption under consideration well know that railroad passengers are continually exposed to risks arising from some momentary lapse of memory or attention on the part of servants who have gained a high reputation for skill, prudence and carefulness, and who were, it may be, selected on that account. A large percentage of accidents will be found to have resulted in the way suggested, without any actual fault on the part of the officers of the corporation. By the rule of *respondeat superior*, a corporation is made liable for the negligence of its servants; but, where the principal has done the best he could, the rule is technical, harsh, and without any basis of inherent justice. It is not the case where a party stipulates for exemption from the legal consequences of his own negligence, but one where he merely stipulates against a liability or imputed negligence in regard to which there is no actual fault. It is easy to see, therefore, that considerations of public policy have no application to such a case."

The situation is strongly put by the Supreme Court of Washington in the case of *Muldoon* v. *Seattle City R. Co*:[17]

"But when the intending passenger proposes to the carrier that it do something for him which he is not under any conceivable circumstances required by law or by his duty to do, viz., to carry him without any compensation whatever, and when the whole matter is at the option of either party to agree or not, it is difficult to see why public policy should step in and deny the carrier the right to limit its chances of loss in the operation, even though a careless servant cause unintentional injury to the passenger. The theory that the granting of passes upon conditions like this will tend to demoralize the servants of railway

[16] (Conn.) 4 Atl. 264.

[17] 22 L. R. A. 798.

and other carriers, and thereby imperil the lives of paying passengers, seems to us mere fancy; and yet this is about the only consideration urged by those courts which hold that there is a public policy in the way of such agreements. Absolutely gratuitous passes represent but an infinitesimal portion of the mileage actually travelled, and of all the passengers carried but an infinitesimal number are injured by the carrier's negligence. The precautions adopted by managers of land and water transportation companies are not gauged by the fact that there may be free passengers aboard, and never will be while the doctrine of *respondeat superior* has its present healthy existence. Considerations of business success, of competition, of the preservation of expensive machinery, of continuance in employment, of the safety of their own lives and limbs, and, to some extent at least, of humanity, have incalculably more influence upon the servants of these carriers than any thought of damage suits in favor of free passengers. The cases from Massachusetts, New Jersey and Wisconsin, above cited, seem to us to present, by conclusive argument, the better reason on this subject, and we adopt the views therein expressed."

A discussion of the many other considerations which suggest themselves would consume more space than we have a right to use, and we shall have to be content with the presentation already made. To those who are interested in the question we may call attention to a brief but suggestive note upon this subject in a recent number of the LAW REGISTER, from the pen of George Ainslie, Esq.[18]

We regret that our court has committed itself to the doctrine of the principal case, because we conceive the better reason to support the opposite view, and, moreover, we believe that such a rule works an injustice to the corporation that would not be tolerated in the case of an individual, besides placing a premium upon fraud, and offering an inducement to duplicity. When the carrier permits the free passenger to ride upon its train on condition that such passenger assume the well known danger incident to the trip, a danger which no human foresight could prevent; and when the passenger solemnly promises to accept the burdens along with the benefits, for the law to allow him, immediately upon receiving the injury, to throw his solemn promise to the winds, and reward the carrier's effort to bestow a favor with an action for damages, is such a monstrous doctrine that we find it hard to believe that courts should ever have given it sanction. If there is one principle which has been more deeply written upon our Constitution and our statute books than another, it is the principle of the absolute sacredness of the obligation of a contract.

Not the least conspicuous among the objections to the doctrine

[18] 8 Va. Law Reg. 391.

under discussion is that it gives judicial sanction to the right of a man to make a contract, and at his pleasure to break it. If the argument of public policy is to be brought into the discussion at all, it should be invoked not against, but in favor of, the validity of such agreements as we have been considering. To employ the language of Sir George Jessel: "You have this paramount public policy to consider, that you must not lightly interfere with the freedom of contract." From our viewpoint, it is to be hoped that the legislature will interfere for the protection of rights which, while pertaining to corporations, are none the less sacred than those of individuals.

Norfolk, Va. S. S. LAMBETH, JR.

STATE REGULATION OF THE RIGHT OF SUFFRAGE—LIMITS TO POWER OF AMENDING THE FEDERAL CONSTITUTION.*

My Dear Sir: Having given some thought to the original and present legal relations of the Federal and State governments, and to the extent that such relations may lawfully be changed through the process of amending the Federal Constitution, I take the liberty of submitting for your consideration the following suggestions:

The whole Government is declared by the Supreme Court of the United States to be composed of an indestructible union of indestructible States; that while it is legally possible for the States to survive the Union, it is not possible for the Union to survive the States. The indestructibility of the States is fundamental. If this proposition be sound, can the Federal Constitution be so amended as to destroy the States? Article V of the Constitution provides that

"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as a part of this Constitution when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the

* Copy of a letter addressed by its author to the Hon. John Goode, President of the late Virginia Constitutional Convention, to whose courtesy we are indebted for the privilege of its publication—EDITOR VIRGINIA LAW REGISTER.